

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EDWARD L. SMITH)	
Claimant)	
)	
VS.)	
)	
TRUCK PARTS & EQUIPMENT, INC.)	
Respondent)	Docket No. 1,012,935
)	
AND)	
)	
AIG CLAIM SERVICES)	
LIBERTY INSURANCE CO.)	
Insurance Carriers)	

ORDER

Claimant requested review of the December 27, 2005 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on April 11, 2006.

APPEARANCES

Chris A. Clements of Wichita, Kansas, appeared for the claimant. Samantha Benjamin of Kansas City, Kansas, appeared for respondent and Liberty Insurance Co. Matthew S. Crowley of Topeka, Kansas, appeared for respondent and AIG Claim Services.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties stipulated that claimant's average weekly wage on December 7, 2001, was \$603.06 and his average weekly wage on August 12, 2003, was \$597.94.

ISSUES

The claimant alleged a series of accidents to his knees culminating on his last day worked on August 12, 2003. The claimant suffered a traumatic injury to his right knee on December 7, 2001, received treatment and continued working. As he continued working, the respondent's workers compensation insurance carrier changed. Ultimately, the claimant had right knee replacement surgery in 2004. Each insurance carrier argued a date of accident within the other carrier's coverage period. It was separately argued by the

respondent and carriers that the date of accident was when claimant suffered the distinct traumatic injury on December 7, 2001, or the date of accident was claimant's last day worked on August 12, 2003, because as he continued performing his regular job duties he permanently aggravated his right knee condition.

The Administrative Law Judge (ALJ) determined claimant suffered a work-related injury on December 7, 2001.¹ The ALJ adopted the permanent impairment rating opinion of the surgeon who performed the knee replacement surgery and awarded claimant compensation for a 37 percent scheduled disability to his right leg.

The claimant requests review of the nature and extent of disability. Claimant argues he is entitled to a 62.5 percent lower extremity impairment based upon an average of Drs. Murati and Estivo's ratings.

Respondent & Liberty Insurance Co. (Liberty) argue the only issue raised on review is the nature and extent of disability. But if date of accident is an issue on review Liberty further argues the claimant suffered a traumatic injury on December 7, 2001, and AIG had coverage on that date. Accordingly, the ALJ's determination of the date of accident should be affirmed. Liberty finally argues the claimant should only be entitled to a 21.75 percent impairment which is an average of Drs. John P. Estivo's and John R. Schurman II's ratings less 50 percent for the preexisting impairment in claimant's right knee.

Respondent & AIG Claim Services (AIG) argue the date of accident should be August 12, 2003, because claimant suffered an ongoing permanent injury to his right knee as he continued to work after December 7, 2001. Because Liberty provided coverage on claimant's last date of work it should be liable for claimant's benefits. AIG further requests the Board to affirm the ALJ's determination claimant suffered a 37 percent scheduled disability to his right leg.

The issues for Board determination are the date of accident and the nature and extent of disability to claimant's right leg.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

¹ Although the body of the Award contains a finding that the date of accident is December 1, 2001, this appears to be a typographical error as the award paragraph provides compensation for a December 7, 2001 date of accident. At oral argument before the Board, the parties agreed the ALJ determined an accident date of December 7, 2001.

Claimant was employed as a yardman for respondent. His job duties included operating a crane and forklift to load and unload steel. He also maintained the 13.5 acre grounds, primarily with a weed eater. Claimant worked nine hour days, five days a week and was always on his feet as he worked. Claimant performed the same job activities during his entire work history with respondent.

Claimant had a history of medical treatment for his knees which included cortisone injections. In 2000, claimant's personal physician, Dr. Brooks had indicated claimant needed his knee replaced and referred claimant to Dr. Estivo who told claimant that at some point he might need a knee replacement.

On December 7, 2001, as claimant was unloading a trailer he fell off and landed on his right knee. Claimant was provided treatment which again consisted of cortisone injections in his knee which reduced the pain for about a month. But he could only get the injections every three months so he also took ibuprofen for pain.

Claimant continued to perform his job without accommodation. Every day he iced his knee for swelling after he would get home from work. As claimant continued working his knee worsened to the point that he finally could not walk on it. The claimant's last day worked was August 12, 2003. Dr. John R. Schurman II, performed knee replacement surgery on June 7, 2004. Claimant said his knee was a lot better after the knee replacement surgery.

Dr. John P. Estivo had treated claimant's right knee with steroid injections and anti-inflammatory medications in April and May 2000. As previously noted, the doctor had told claimant that at some point he might need a knee replacement. Dr. Estivo again examined claimant on June 16, 2005, after the right knee replacement surgery. Based upon the AMA *Guides*,² Dr. Estivo opined claimant had a 50 percent impairment to his right lower extremity. Dr. Estivo further opined claimant had a 25 percent impairment to his right lower extremity due to degenerative joint disease before claimant suffered the fall at work on December 7, 2001.

Dr. Estivo opined that claimant did not suffer additional permanent injury to his knee after the fall at work on December 7, 2001, but he noted that it was to be anticipated that claimant would experience ongoing pain and symptoms after that incident. The doctor agreed that after the injury on December 7, 2001, claimant's continued work activities such as walking on uneven surfaces, bending, stooping, squatting, kneeling, climbing and continually being on his feet nine hours a day all aggravated his knee condition. But Dr. Estivo explained that although claimant's activities after December 7, 2001, made his

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

condition symptomatic, nonetheless, those activities did not result in additional permanent aggravation of claimant's right knee condition.

Dr. Pedro A. Murati examined claimant on January 6, 2005, at his attorney's request. Dr. Murati, based upon the *AMA Guides*, opined claimant has a 75 percent impairment to his right lower extremity. Dr. Murati agreed that the December 7, 2001 accident accelerated the need for claimant's knee replacement surgery and was the major reason claimant needed such surgery. But the doctor further noted claimant's continued work activities aggravated his condition.

The claimant's injury was limited to and he seeks compensation for his right lower extremity. K.S.A. 44-510d(a)(23) provides:

Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Dr. Schurman II's medical records were, by stipulation of the parties, included as part of the evidentiary record. Included in those records was a letter to AIG's counsel dated April 12, 2005. In the letter Dr. Schurman II, noted:

I am in receipt of your letter dated 02/25/2005 regarding Edward Smith. As you know, Mr. Smith underwent a total knee replacement on 06/07/2004. When last seen in our office on 10/20/2004, he was doing well. It was anticipated that he would return for followup at a one-year visit. I would expect his function to continue to improve over time and expect to see him back for his one-year followup. Should he seek an impairment rating, I think he could be seen earlier in the next several weeks and this could be satisfactorily completed. I think, he should probably be rated at more than a six-month followup. We will be glad to see him back per your wishes. **He is sent with a 37% lower extremity impairment.**³ (Emphasis Added)

Dr. Schurman II's deposition was not taken and there is no explanation how the doctor arrived at or what he specifically meant by the comment regarding a 37 percent lower extremity impairment. Moreover, the letter first indicated the doctor needed to see the claimant again before an impairment rating could be completed. Finally, there is also no indication the doctor utilized the *AMA Guides*, as required by statute, to arrive at the cryptic comment regarding a 37 percent impairment. Consequently, the Board does not find Dr. Schurman II's letter persuasive regarding the nature and extent of claimant's disability.

³ Stipulation to Admit Medical Records (Oct. 18, 2005) at 3.

Both Drs. Murati and Estivo utilized the *AMA Guides* to arrive at their impairment ratings. Dr. Murati concluded claimant suffered a 75 percent impairment to his right lower extremity and Dr. Estivo concluded claimant suffered a 50 percent impairment to his right lower extremity. After carefully considering the doctors' opinions, the Board is not convinced that either rating is any more persuasive than the other. Accordingly, the Board averages the two ratings and concludes claimant has sustained a 62.5 percent functional impairment to his right leg.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injury is an aggravation of a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.⁴

The Board interprets the above statute to require that a ratable functional impairment must preexist the work-related accident. The statute does not require that the functional impairment was actually rated or that the individual was given formal medical restrictions. But it is critical that the preexisting condition actually constituted an impairment in that it somehow limited the individual's abilities or activities. An unknown, asymptomatic condition that is neither disabling nor ratable under the *AMA Guides* cannot serve as a basis to reduce an award under the above statute.

A physician may appropriately assign a functional impairment rating for a preexisting condition that had not been rated. However, if possible the physician should consider the claimant's contemporaneous medical records regarding the prior condition. The medical condition diagnosed in those records and the evidence of the claimant's subsequent activities and treatment should then be the basis of the impairment rating using the appropriate edition of the *AMA Guides*.

Dr. Estivo had treated claimant's knee in 2000 and diagnosed claimant with degenerative joint disease. Claimant was symptomatic at that time and the condition of claimant's knee was such that the doctor told claimant that he might need a total knee replacement sometime in the future. Claimant continued to receive intermittent injections in his knee which continued after the fall at work on December 7, 2001. Dr. Estivo opined claimant had a preexisting 25 percent impairment to his right leg before that incident.

Consequently, the Board finds the claimant's 62.5 impairment shall be reduced by the preexisting 25 percent functional impairment. The ALJ's Award should be modified to

⁴ K.S.A. Supp. 44-501(c).

grant claimant permanent disability benefits for a 37.5 percent loss of use of the right leg under the provisions of K.S.A. 44-510d(a)(16).

The date of accident determines which insurance carrier for respondent is liable for the award of compensation. Claimant met his burden of proof to establish that he suffered accidental injury to his right lower extremity in a fall at work on December 7, 2001. The dispute is whether he suffered additional permanent injury as he continued working after that date.

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's continued work activities after the fall at work on December 7, 2001, aggravated, accelerated or intensified the underlying disease or affliction.⁵

Dr. Estivo opined that although claimant's activities after December 7, 2001, made his condition symptomatic, nonetheless, those activities did not result in additional permanent aggravation of claimant's right knee condition. Dr. Murati agreed that the fall at work was the major cause for claimant's knee replacement surgery but he further indicated claimant's continued work activities did aggravate his condition.

In situations such as this, there is often a very fine line between what would be described as a new and separate accidental injury versus a natural consequence of the original injury. In this instance, based upon the record compiled to date, the Board finds Dr. Estivo's opinion more persuasive and affirms the ALJ's determination of a December 7, 2001 date of accident. The claimant's knee condition and resultant surgery was a natural and probable consequence of the December 7, 2001 work-related accident.⁶

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge John D. Clark dated December 27, 2005, is modified to award claimant compensation based upon an increased 37.5 percent loss of use of the right leg caused by the December 7, 2001 work-related accident and affirmed in all other respects.

The claimant is entitled to 30 weeks of temporary total disability compensation at the rate of \$402.06 per week in the amount of \$12,061.80 followed by 63.75 weeks of permanent partial disability compensation, at the rate of \$402.06 per week, in the amount

⁵ See *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, rev. denied 265 Kan. 884 (1998).

⁶ *Casco v. Armour Swift-Eckrich*, 34 Kan. App. 2d 670, 128 P.3d 401 (2005).

of \$25,631.33 for a 37.5 percent loss of use of the right leg, making a total award of \$37,693.13.

IT IS SO ORDERED.

Dated this _____ day of May 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
Samantha Benjamin, Attorney for Respondent and Liberty
Matthew S. Crowley, Attorney for Respondent and AIG
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director